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July 23, 1999

VIA HAND-DELIVERY
Magalie Salas, Esq.
Secretary
Federal Communications Commission
Room TW-B204
445 12th Street, S.W.
Washington, D.C. 20554

Re: Reply to Opposition to Petition for Partial Stay
PR Docket No. 92-235

Dear Ms. Salas:

Enclosed herewith on behalf of Forest Industries Telecommunications, is an original and four copies of its Reply to Opposition to Petition for Partial Stay.

If there are any questions regarding this matter, please contact me.

Sincerely,

Paul J. Feldman
Counsel for Forest Industries
Telecommunications

Encls.

cc: Certificate of Service

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Before the
Federal Communications Commission
Washington DC 20554

In the Matter of	)	
	)	
Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them.	)	
	)	PR Docket No.92-235
and	)	
	)	
Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services	)	

To: The Commission

REPLY TO OPPOSITION TO PETITION FOR PARTIAL STAY

Forest Industries Telecommunications ("FIT"), by counsel, hereby files this Reply to the Opposition to Petition for Partial Stay filed by the United Telecom Council ("UTC") filed on July 16, 1999 in the above-captioned proceeding ("UTC Opposition to FIT"). The UTC filing opposed a Petition for Partial Stay filed by FIT on July 9, 1999 ("FIT Petition") seeking a stay of the effectiveness of that part of the Second Memorandum Opinion and Order, ("*Second MO&O*") released in the above-referenced proceeding on April 13, 1999, FCC 99-68, which amends Section 90.35(b) of the Commission's Rules to designate the petroleum and power frequency coordinators as the mandatory coordinator(s) for the frequencies in the 150-160 and 450-470 MHZ band which were shared by the Power, Petroleum, and the Forest Products Radio Services, prior to the

consolidation of the private land mobile radio services by the Commission's Second Report and Order in this proceeding.

UTC completely failed to address the arguments made in the FIT Petition, claiming that because the FIT Petition "simply restates the arguments set forth in the *Motion for Expedited Partial Stay* filed by MRFAC on July 7, 1999 (MRFAC Motion), and provides no additional grounds for consideration," UTC need only incorporate by reference its Opposition to the MRFAC Motion. This approach is fatally flawed, as the FIT Petition indeed makes arguments different that those made by MRFAC: arguments about the specific likelihood of harm to FIT. UTC has thus failed to address those arguments and in effect concedes them. Furthermore, even if UTC's arguments applied to the FIT pleading as well as the MRFAC pleading, the UTC arguments are themselves flawed.

I. UTC Failed to Contest the Harm That FIT is Likely to Suffer Absent a Stay.

In its Petition, FIT demonstrated that as part of the justification for grant of a partial stay, FIT is likely to suffer irreparable harm absent grant of a stay:

1. FIT will lose a substantial portion of the revenues it now earns from its coordination services and those losses would not be recoverable;

2. FIT would very likely lose to API or to UTC much of its traditional coordination customer base, the members of the forest products industry;

3. FIT stands to lose a substantial portion of its membership.

Cumulatively, the loss of income,[1] the potential loss of coordination customers, and the

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[1] As was noted in the FIT Petition, during the past two years nearly 93% of the applications of its members involved the previously shared frequencies. The *Second MO&O* revokes FIT's authority to coordinate those frequencies and eliminates that source of FIT's coordination income. Such an action violates the Takings provision

potential loss of its membership threatens the viability of FIT as a coordinating entity and as an organization. FIT Petition at pages 9-11.

While FIT argues in its Opposition to MRFAC Motion that other coordinators (such as MRFAC and FIT) could coordinate frequencies in the Industrial/Business pool, FIT stated in its Petition that after the consolidation of the services, by far the bulk of its coordination business comes from the forest products industry, and involve the frequencies at issue. As a result, the arguments made by UTC regarding harm to MRFAC are not applicable to FIT. In sum, the showing of harm made by FIT is uncontested.

II. UTC Has Failed to Undercut the FIT Showing That the Revision to Section 90.35(b) Was Not a "Logical Outgrowth" of the API Petition.

As cited in the UTC Opposition to MRFAC Motion, it is well settled that in order for parties to have adequate notice in a rulemaking proceeding, the final rule must be at least a "logical outgrowth" of the proposed rule, if it differs from the proposed rule. Natural Resources Defense Council v. US EPA, 8244 F.2d 1258, 1283 (1st Cir. 1987). In its Petition for Partial Stay, FIT demonstrated that the revision to Section 90.35(b) is not a "logical outgrowth" of the API Petition to which the revision responded. UTC's Opposition to the MRFAC Motion fails to undercut that showing.

First, UTC argues that "throughout this proceeding, the FCC has broadly inquired into the appropriate level of consolidation and other proposals that might satisfy the goals established by the FCC..." and noted that the original *Notice of Proposed Rulemaking* in the proceeding requested comment on "any other alternatives." UTC

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of the Fifth Amendment.

Opposition to MRFAC Motion at pages 4-5. This argument is transparently invalid: just because the Commission sought comment on "any other alternatives" doesn't mean that any result is a "logical outgrowth" of the *Notice*; if so than this would vitiate the "logical outgrowth" requirement. Furthermore, the comments responsive to the *Notice* were addressed and were disposed of in the *First Report and Order* and *Second Report and Order* in this proceeding. The revision to Section 90.35(b) to which FIT objects was not raised in comments responsive to the *Notice*, but rather in the Petition for Reconsideration filed by API after the *Second R&O*. Accordingly, the notices of proposed rulemaking released earlier in the proceeding provided no notice to FIT of the revision to Section 90.35(b), nor did they provide the FIT the "fair opportunity to comment" required under the Natural Resources Defense Council case. 824 F.2d at 1284. Thus, the existence and content of the various earlier *Notices* are irrelevant to this issue. Only the content of the API Petition is relevant.

The API Petition merely asked for the opportunity to concur on applications for systems that could place an interfering signal within the service area of existing petroleum systems.[2] The Commission denied API's request and adopted instead the far reaching amendment to Section 90.35(b) at issue here: giving API (and UTC) the sole authority to coordinate those frequencies. Denying the API request could not have been an "outgrowth" of the request. Indeed, the proof that the revision was not a mere "outgrowth" of the API request is that while FIT opposes the revision to Section 90.35(b), it supported the API Petition.

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[2]See API's Petition for Reconsideration at p. 8.

In sum, UTC has failed to undercut the FIT showing that the revision to Section 90.35(b) was not a logical outgrowth of the API petition. On this basis alone, the Commission should stay effectiveness of the rule until it considers FIT's Petition for Reconsideration, or until the Commission issues a Notice of Proposed Rulemaking on the revised Section 90.35(b).

III. UTC Has Failed to Undercut the FIT Showing That Grant of a Stay Would Not Significantly Harm Other Parties.

In its Petition for Partial Stay, FIT demonstrated that grant of a stay would not harm other parties or the public interest. FIT demonstrated that since neither API nor UTC (nor AAR or AAA) requested the rule revision at issue here, the Commission may reasonably conclude that a temporary suspension of the rule would not unduly adversely affect their interests. Concerns about interference to safety related communications in the industries involved can be addressed reasonably well within the current coordination process, and have been addressed with success for over fifty years. Under current rules, coordinators are required to notify all other coordinators within one day after a frequency recommendation is made. See Section 90.176 of the Commission Rules. If the notice requirement under Section 90.176 is timely and properly given, the petroleum and/or power coordinators can and should be able to take the appropriate actions to prevent the authorization of potentially incompatible systems. Petition at page 12.

UTC's Opposition fails to undercut the FIT arguments. Indeed, UTC concedes that "there have been no reported instances of interference [to Power or Petroleum Industry stations] from MRFAC-coordinated systems...." UTC Opposition to MRFAC

Motion at page 7. This specific statement belies the vague and completely unsupported assertions elsewhere in the Opposition regarding the danger of interference.

The same concession made in the UTC Opposition regarding lack of interference from Manufacturers Radio stations into the stations operated by the Petroleum and Power industries, can also be made regarding the lack of interference from Forest Products Industry facilities. FIT knows of no reported instances of interference to Power or Petroleum Industry stations from FIT-coordinated systems.

In sum, the showing of no harm to other parties made by FIT in its Petition for Partial Stay remains uncontested. Indeed, given the five decades of success in shared coordination, it would be near impossible to demonstrate that the short additional amount of time necessary to process petitions for reconsideration would be harmful.

IV. Conclusion

As demonstrated in its Petition, FIT respectfully submits that a partial stay of the *Second MO&O* as requested is fully justified and should be granted as soon as possible.

Respectfully submitted,

FOREST INDUSTRIES TELECOMMUNICATIONS

By _____
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July 23, 1999

CERTIFICATE OF SERVICE

I, Stacy R. Eveslage, a secretary in the law firm of Fletcher, Heald & Hildreth, hereby certify that on this 23rd day of July, 1999, copies of the foregoing *Reply to Opposition to Petition for Partial Stay* were served on the parties listed below by hand delivery or first class mail:

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